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Supreme Court of the United States

OCTOBER TERM, 1929.

No. ~~629~~ 39

RUSSIAN VOLUNTEER FLEET CORPORATION

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES RECHT,
HORACE S. WHITMAN,
WILLIAM L. MARBURY, JR.,
Counsel for Petitioner.

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No. 623.

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vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Claims was rendered on April 1, 1929, and has not yet been officially reported. It is printed in the Petition and Transcript of Record (hereinafter cited as "R.") at pages 35-38.

II.

JURISDICTION.

1. Acts, February 13, 1925, c. 229, sec. 3 (b), 43 Stat. at L. 939 (U. S. C., Tit. 28, sec. 288 (b)).

2. The judgment sought to be reviewed was rendered by the Court of Claims on April 1, 1929 (R. p. 39). On May 24, 1929, the Court of Claims allowed a motion extending the time in which a motion for a new trial might

be filed. On July 29, 1929, the time for filing the motion for a new trial was again extended by the Court until September 1, 1929.* Such a motion was duly filed on August 30th and was overruled on November 4, 1929, at which time the judgment became final (R. p. 39). The petition for *certiorari* and exhibit thereto was filed with the Clerk of this Court on February 3, 1930 (R. p. 39).

3. The judgment below finally dismissed the claim of the Petitioner to compensation for property taken by the United States pursuant to Acts, June 15, 1917, c. 29, "Emergency Shipping Fund," 40 Stat. at L. 182. The order of dismissal was based upon a finding that the plaintiff was not entitled to sue the United States in the Court of Claims and that the Court was, therefore, without jurisdiction. The case falls within the plain language of the Acts, February 13, 1925, c. 229, sec. 3 (b), hereinbefore referred to, which provides as follows:

> "In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

The order of the Court of Claims passed on May 24, 1930, extending the time for the filing of a motion for a new trial deprived the judgment of April 1, 1929, of any finality. By retaining jurisdiction of the case, the Court

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* The facts as to the extension of time for the filing of the motion for a new trial were inadvertently omitted from the Record as originally printed. A stipulation supplementing the Record in this respect, signed by counsel for both parties, has been filed with the Clerk of this Court.

held the case open for further consideration, this being the accepted practice of the Court of Claims followed in numerous cases. The judgment of the Court of Claims being no longer final, the period within which it was necessary to file the petition for *certiorari* did not begin to run until the motion for a new trial was overruled on November 4, 1929. The petition herein was filed within three months thereafter.

4. As to the timeliness of the filing of the petition for writ of *certiorari* see *Morse v. United States*, 270 U. S. [redacted] *Chicago Great Western R. R. Co. v. Basham*, 249 U. S. 164; *Texas & Pacific Railway Co. v. Murphy*, 111 U. S. 488; *Chicago & Alton R. R. Co. v. United States*, 54 Ct. Claims 116; *Clarke v. Eureka County Bank*, 131 Fed. 145.

As to the nature of the case see *United States v. Carver*, 278 U. S. 294; *Sioux Indians v. United States*, 277 U. S. 424.

III.

STATEMENT OF THE CASE.

While the case was fully stated in the petition for *certiorari* (R. pp. 2-5), that statement is for the convenience of the Court repeated here in more concise form with references to the pages of the printed Record.

This suit was brought in the Court of Claims by the Petitioner, a corporation organized and existing under the laws of Russia (R. p. 7) against the United States, to recover the value of two ship-building contracts requisitioned by the United States Shipping Board Emergency Fleet Corporation on August 16, 1917 (R. pp. 11-13). The requisition was made in exercise of the powers conferred upon the President by Acts, June 15, 1917, c. 29, "Emer-

gency Shipping Fund," 40 Stat. at L. 182, and by him delegated to the Fleet Corporation by Executive Order dated July 11, 1917 (R. p. 10). The relevant provisions of that Act are set out in the petition (R. pp. 8-10).

Although the Fleet Corporation at the time of requisitioning the contracts recognized the right of your Petitioner to compensation (R. pp. 11-13) and has since valued that right at the sum of $1,412,532.35 as of March 5, 1920, (R. p. 14), no payment has been made to your Petitioner of said sum or any part thereof (R. pp. 14-15). Your Petitioner not being satisfied with the award made by the Fleet Corporation and having been refused payment of any part thereof, instituted this suit in the Court of Claims on the 23rd day of March, 1921 (R. p. 7). By leave of Court an amended petition was filed on the 16th day of October, 1924 (R. pp. 7-15). For further procedural details, reference is made to the petition for *certiorari* (R. p. 4).

The Court of Claims dismissed this suit for want of jurisdiction before any testimony was taken, the decision being based on the following propositions (R. pp. 35-38):

(1) That the right of the Petitioner to bring this suit is limited by Section 155 of the Judicial Code (U. S. C., Title 28, Sec. 261), which provides as follows:

> "Aliens who are citizens or subjects of any Government which accords to citizens of the United States the right to prosecute claims against such Government in its courts, shall have the privilege of prosecuting claims against the United States in the Court of Claims, whereof such court, by reason of their subject matter and character, might take jurisdiction."

(2) That the Courts of the United States cannot admit proof of the existence of any foreign Government which the Government of the United States has not "recognized" (i. e., with which the Executive Department has not established diplomatic relations).

(3) That in any event the privilege of suing the United States under Sec. 155 is reserved to citizens of States, the existing Governments of which are "recognized" by the Department of State.

In short, the Court of Claims has held that *because the Petitioner is a corporation organized under the laws of Russia,* it has no standing to maintain this suit against the United States to recover just compensation for its private property, notwithstanding the explicit provision of the Act of Congress under which that property was taken, that suit might be maintained against the United States in the Court of Claims by *any corporation* to recover such compensation (See R. pp. 8-10).

IV.

SPECIFICATION OF ERRORS.

(1) The Court of Claims erred in dismissing the petition for want of jurisdiction.

(2) The Court of Claims erred in holding that the right of your Petitioner to maintain this suit is in any way limited by the provisions of Section 155 of the Judicial Code.

(3) The Court of Claims erred in holding that Section 155 of the Judicial Code properly construed does not authorize a corporation organized under the laws of the State of Russia to maintain suit against the United States in the Court of Claims.

(4) The Court of Claims erred in holding that it was without power to take proof of the existence of a Government in Russia and of the existence of a judicial system providing for the prosecution of claims against such Government.

V.

ARGUMENT.

SUMMARY.

A. The decision below construes the Act of June 15, 1917, in a manner not in harmony with the Fifth Amendment, and is in conflict with applicable decisions of this Court.

B. The holding of the court below that the right of persons whose property is taken under the Act of June 15, 1917, to sue the United States is limited by Section 155 of the Judicial Code, is in conflict with the principles of statutory construction adopted by this court in considering similar legislation.

C. The holding of the court below that the right of aliens to maintain suits against the United States under Section 155 of the Judicial Code is limited to aliens who are citizens of recognized governments, is both novel and of great practical importance, and reads into that section an implied limitation which has never previously been held to exist.

D. The decision below raises novel questions of general municipal law and of public international law, which have never been passed upon by this court, which are of great practical importance, and which were decided by the court below in a manner in conflict with the weight of authority, the decisions of other Federal courts, and with the great weight of scholarly opinion.

A.

THE DECISION BELOW CONSTRUES THE ACT OF JUNE 15, 1917, IN A MANNER NOT IN HARMONY WITH THE FIFTH AMENDMENT AND IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

That the present suit was brought by the Petitioner under the provisions of the Act of June 15, 1917, c. 29, and that the Petitioner is entitled to the benefits of that Act notwithstanding the fact that no payment has ever been made to it by the President, see *Houston Coal Co. v. United States*, 262 U. S. 361; *United States v. McNeil & Sons*, 267 U. S. 302; *United States v. Carver*, 278 U. S. 294.

The Court of Claims held that aliens whose property was taken by the President under the Act of June 15, 1917, are without remedy in the Courts of the United States to recover just compensation for their property so taken, unless they can satisfy the condition of Section 155 of the Judicial Code that similar suits may be brought by citizens of the United States against the Governments of which the aliens in question are citizens, and a further condition, *read into* Section 155 by the Court of Claims, that they are the citizens of recognized Governments.

The Petitioner contends that this construction of the Act of June 15, 1917, is not permissible because, (1) *the Fifth Amendment to the Constitution of the United States forbids it*, and, (2) *the decisions of this Court construing the very legislation in question clearly require the opposite result.*

The Petitioner bases its argument on the guaranty of the Fifth Amendment that private property shall not be taken for public use without payment of just compensation therefor. This guaranty is available to aliens as

well as citizens and is the foundation upon which the construction of any statute authorizing the exercise by the President of the powers of eminent domain must be built.

Wong Wing v. United States, 163 U. S. 228, 242.
Truax v. Raich, 239 U. S. 33, 39.

The President in requisitioning the property of the Petitioner under the provisions of the Act of June 15, 1917, was exercising the power of eminent domain. *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106. That statute must, therefore, be construed in harmony with the Fifth Amendment so that the Petitioner whose property was taken will receive just compensation therefor.

Monongahela Nav. Co. v. United States, 148 U. S. 312;
Seaboard Air Line v. United States, 261 U. S. 299;
Brooks-Scanlon Corp. v. United States, supra;
Phelps v. United States, 274 U. S. 341.

Upon these principles *this very Act* was held to require the payment of interest to persons whose property was taken by the President, although no provision was made in the statute for the payment of such interest. *Brooks-Scanlon Corp. v. United States, supra.* This holding was based squarely on the necessity of construing the statute in such a way as to conform to the guarantees of the Fifth Amendment, and was in direct conflict with the general statute. *The Seaboard Air Line Case, supra,* contains a full discussion of the principles involved.

So here, the Act must be construed in such a manner as to provide just compensation to aliens and citizens

alike. It was error for the Court of Claims to defeat the special intent of that Act to assure just compensation to persons whose property was taken for public use, by reading in the limitations of a general statute passed more than sixty years ago.

A case clearly analogous is *Richmond Screw, etc. Co. v. United States*, 275 U. S. 331. There Congress by the Act of July 1, 1918, c. 114, 40 Stat. 704, 705, prohibited suits for infringement against contractors who were engaged in furnishing war supplies to the Government and undertook to substitute for such liability a remedy by suit against the United States in the Court of Claims. Section 3477 of the Revised Statutes had been held to prohibit suits against the Government by an assignee of a patent for prior infringement. Suit was brought by an assignee against the United States relying on the provisions of the Act of July 1, 1918. Section 3477 was held by the Court of Claims to bar the action. That judgment was reversed by this Court. CHIEF JUSTICE TAFT said (p. 346):

> "It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality. *Phelps v. United States*, 274 U. S. 341. Moreover, we should seek to carry out in our dealing with the Act of 1918 and Revised Statutes 3477 the very important Congressional purpose of the former as already explained, in the promotion of the War, as a special legislative intent. It is our duty to give effect to that special intent although it be not in harmony with a broad purpose manifested in a general statute avoiding assignment of claims against the Government, enacted some eighty years ago. *In re Rouse, Hazard & Co.*, 91 Fed. 96, 100, 101; *Townsend v. Little*, 109 U. S. 504, 512; *Washington v. Miller*, 235 U. S. 422, 428. This is in accord with general rules of interpretation, as shown in these authorities, and recon-

> ciles Section 3477 Revised Statutes and the Act of 1918, if we hold, as we do, that Section 3477 does not apply to the assignment of a claim against the United States which is created by the Act of 1918 in so far as the Act deprives the owner of the patent of a remedy against the infringing private contractor for infringements thereof and makes the Government indemnitor for its manufacturer or contractor in his infringements."

The Court will observe that CHIEF JUSTICE TAFT cited the *Phelps Case, supra,* as controlling authority.

B.

THE HOLDING OF THE COURT BELOW THAT THE RIGHT OF PERSONS WHOSE PROPERTY IS TAKEN UNDER THE ACT OF JUNE 15, 1917, TO SUE THE UNITED STATES IS LIMITED BY SECTION 155 OF THE JUDICIAL CODE, IS IN CONFLICT WITH THE PRINCIPLES OF STATUTORY CONSTRUCTION ADOPTED BY THIS COURT IN CONSIDERING SIMILAR LEGISLATION.

CHIEF JUSTICE TAFT, in the opinion just quoted, did not rely solely on the necessity of construing the Act of Congress in such a manner as not to conflict with the Fifth Amendment, but stated as a separate ground for decision that limitations expressing broad purposes contained in general acts enacted many years ago should not be read into special war legislation in such a manner as to limit its remedial character.

This principle is clearly applicable to the present case. As a result of the war emergency, Congress passed many acts conferring extraordinary powers upon the President to appropriate private property. See *United States v. Pfitsch,* 256 U. S. 547. The powers thus conferred upon the President necessitated special care in providing an adequate remedy for the persons whose property should be thus abruptly requisitioned. Each of the acts in ques-

tion provided such remedies and it has been settled by repeated decisions, that they must be construed in accordance with plain meaning and without regard to general acts which might limit or destroy their efficacy. *United States v. Pfitsch, supra; Nassau Smelting Works v. United States,* 266 U. S. 101; *United States v. Skinner & Eddy Corp.,* 35 Fed. (2d) 889.

There can be no doubt but that the provisions of the Act of June 15, 1917, if considered without regard to the limitations of Section 155 of the Judicial Code, confer upon all aliens the right to sue the United States in the Court of Claims. The Act confers the right upon *any corporation* (See R. pp. 8-10). The Act refers to two sections of the Judicial Code, obviously for the purpose of indicating in what forum suit shall be brought. Those sections do not effect the rights of aliens nor do they refer to any other section which does.

The original acts creating the Court of Claims and conferring its jurisdiction upon them contained similar language which was uniformly construed to permit suit by aliens. (See 10 Stat. at L. 612; 12 Stat. at L. 820.)

Byrnes v. United States, 3 Ct. Clms. 195, 197;
Waltjen's Case, 3 Ct. Clms. 238;
McElhose's Case, 3 Ct. Clms. 240.

These cases gave rise to the passage of the Act of July 27, 1868 (15 Stat. at L. 243), which expressly took away from aliens the authority to sue the United States with a proviso similar to that now found in Section 155 of the Judicial Code. Section 155 is thus seen to be *a limiting act and not an enabling act* and thus not properly applicable to the present case.

C.

THE HOLDING OF THE COURT BELOW THAT THE RIGHT OF ALIENS TO MAINTAIN SUITS AGAINST THE UNITED STATES UNDER SECTION 155 OF THE JUDICIAL CODE IS LIMITED TO ALIENS WHO ARE CITIZENS OF AUTHORIZED GOVERNMENTS, IS BOTH NOVEL AND OF GREAT PRACTICAL IMPORTANCE, AND READS INTO THAT SECTION AN IMPLIED LIMITATION WHICH HAS NEVER PREVIOUSLY BEEN HELD TO EXIST.

The history of Section 155 which has just been expounded, makes it clear that this Act did not confer special privileges on aliens, *but took away from certain classes of aliens privileges which had theretofore been conferred upon them.* Were it not for this provision of Section 155, *any alien* might sue the United States in the Court of Claims on the same footing with a citizen. It is, therefore, erroneous to regard Section 155 in the light of an Act conferring a privilege, to be strictly construed. Yet the Court of Claims, not content with applying Section 155 to suits brought under the Act of June 15, 1917, and thus depriving of just compensation many citizens of foreign States with which the United States is on perfectly amicable terms, insisted upon *reading into* Section 155 *an additional limitation* which has the effect of taking away the remedy of the citizens of any Government not recognized by the Government of the United States.

This ruling manifestly affects the rights of a great part of the civilized world; it reads into the statute a limitation not fairly deducible from its language: it deprives of all judicial remedy, private persons who are *ex hypothesi* without remedy through diplomatic channels; it falls upon friend and foe alike. *It deprives of all remedy against confiscation*, citizens of States with which

we have declined to establish diplomatic relations *because of the confiscatory nature of their laws*—an ironical result.

The decisions of this Court have condemned the practice of importing into an Act of Congress seriously affecting international relations, words which it does not contain.

The Three Friends, 166 U. S. 1, 66.

D.

THE DECISION BELOW RAISES NOVEL QUESTIONS OF GENERAL MUNICIPAL LAW AND OF PUBLIC INTERNATIONAL LAW, WHICH HAVE NEVER BEEN PASSED UPON BY THIS COURT WHICH ARE OF GREAT PRACTICAL IMPORTANCE AND WHICH WERE DECIDED BY THE COURT BELOW IN A MANNER IN CONFLICT WITH THE WEIGHT OF AUTHORITY, THE DECISIONS OF OTHER FEDERAL COURTS, AND WITH THE GREAT WEIGHT OF SCHOLARLY OPINION.

The Court of Claims adopted the contention advanced below that it was without power to admit proof of the existence of any Government in Russia or of any judicial system in that State, for the reason that official diplomatic relations had not been established between our Government and the Soviet Regime. That decision is inconsistent with another decision of the same Court, *Rossia Ins. Co. v. United States,* 58 Ct. Clms. 180; it conflicts with a recent decision of another Federal Court, *Banque de France v. Equitable Trust Co.,* 33 Fed. (2d) 202; and it is in conflict with the well considered cases, here and abroad.

Wulfsohn v. R. S. F. S. R., 234 N. Y. 372;
Sokoloff v. National City Bank, 239 N. Y. 158;

Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149;
Dougherty v. Equitable Life Ass. Soc., 236 N. Y. S. 673;
Perry v. Equitable Life Ass. Soc., 45 T. L. R. 468.

The State Department has itself repeatedly referred to the Soviet Regime and has characterized it as "*the regime now functioning in Russia.*" See letter from Secretary HUGHES to Mr. Lindley M. Garrison set forth in *Russian Government v. Lehigh Valley R. R. Co.*, 293 Fed. 135, at page 137.

Moreover the decision below is in conflict with the great weight of scholarly opinion. We cite only a few of the recent monographs discussing the principles of law involved in this case.

Hervey, *Legal Effects of Recognition in International Law*, (1929);
Dickinson, *The Unrecognized Government or State in English and American Law*, 22 Mich. L. R. 29;
Fraenkel, *The Juristic Status of Foreign States, etc.*, 25 Col. L. R. 544;
Connick, *The Effect of Soviet Decrees in American Courts*, 34 Yale, L. J. 499;
Houghton, *The Validity of The Acts of Unrecognized Governments, etc.*, 13 Minn. L. R. 216.
35 Harvard, L. R. 607, 768; 37 Id. 606; 38 Id. 816, 832; 39 Id. 127; 41 Id. 102; 35 Yale L. J. 98, 150, at 155; 30 Col. L. R. 226 (Feb. 1930).

These selected citations are sufficient to indicate the novelty and importance of the questions involved.

CONCLUSION.

The policy of the Government of the United States not to recognize any Government, regardless of its stability, which does not conduct itself in accordance with our accepted standards of international behavior, necessarily leads to the result, that from time to time, large areas of the civilized world are under the control of governments with which our Government has not established diplomatic relations. This policy has been consistently pursued for a great many years and there is no indication that it will be abandoned in the future. Thus the construction placed upon Section 155 of the Judicial Code by the Court of Claims is extremely far reaching in scope.

But the alternative ground upon which the Court of Claims based its decision, to wit, the theory that the Court must assume that there is no government in Russia, and that private rights of citizens of unrecognized states are unenforcible in our courts, is even more sweeping in its effect. Yet the refusal of the Court below to permit your petitioner to establish proof of the existence of judicial remedies against the present Government of Russia or against the Kerensky Government, was apparently based on that principle.

It is, therefore, respectfully submitted that a writ of certiorari should be granted and that this Court should review the judgment of the Court of Claims for the reasons heretofore advanced which may be epitomized as follows:

1. Because the decision below leaves your Petitioner, whose property has been taken by the United States for public use, without remedy for what thereby becomes an act of confiscation.

2. Because the decision below defeats the guarantees of the Fifth Amendment and the express purpose of Congress as set forth in the Act authorizing the taking, that just compensation be paid for all private property thus appropriated.

3. Because the decision below deprives the citizens of states not controlled by governments having diplomatic relations with the Government of the United States, of all remedy for past, and all protection against future appropriation by the United States of their private property.

4. Because the decision below enunciates a doctrine which would place completely beyond the domain of law, the private rights of all citizens of states controlled by governments not enjoying diplomatic relations with the Government of the United States.

Respectfully submitted,

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